

## HOUSE BILL NO. 428

INTRODUCED BY GUTSCHE, MUSGROVE, HARRIS, COHENOUR

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE LAWS RELATING TO ENFORCEMENT PROCEDURES OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY UNDER THE MONTANA STRIP AND UNDERGROUND MINE RECLAMATION ACT, THE METAL MINE RECLAMATION LAWS, AND THE OPENCUT MINING ACT; PROVIDING STANDARD PROCEDURES FOR ISSUING AND APPEALING ADMINISTRATIVE ORDERS; PROHIBITING THE DEPARTMENT FROM WAIVING A PENALTY ASSESSED UNDER THE MONTANA STRIP AND UNDERGROUND MINE RECLAMATION ACT IF A PERSON OR OPERATOR FAILS TO ABATE THE VIOLATION IN ACCORDANCE WITH A NOTICE OR ORDER; PROVIDING FOR A WRITTEN RELEASE OF LIABILITY UNDER THE MONTANA STRIP AND UNDERGROUND MINE RECLAMATION ACT; PROVIDING PENALTIES FOR VIOLATIONS OF THE METAL MINE RECLAMATION LAWS AND THE OPENCUT MINING ACT; AMENDING VENUE PROVISIONS UNDER METAL MINE RECLAMATION LAWS AND THE OPENCUT MINING ACT; AND AMENDING SECTIONS 82-4-254, 82-4-361, AND 82-4-441, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 82-4-254, MCA, is amended to read:

**"82-4-254. Violation -- penalty -- waiver.** (1) Except as provided in subsection (2), a person or operator who violates any of the provisions of this part, rules adopted or orders issued ~~adopted~~ under this part, or term or condition of a permit and any director, officer, or agent of a corporation who willfully authorizes, orders, or carries out a violation shall pay ~~a civil~~ an administrative penalty of not less than \$100 or more than \$5,000 for the violation and an additional ~~civil~~ administrative penalty of not less than \$100 or more than \$5,000 for each day during which a violation continues and may be enjoined from continuing the violations as provided in this section. Any person or operator who fails to correct a violation within the period permitted by law, rule of the board, or order of the department must be assessed a penalty of not less than \$750 for each day, up to 30 days, during which the failure or violation continues. The period permitted for correction of a violation does not, in the case of any review proceeding under 82-4-251(6), end until entry of a final order suspending the abatement requirements or until entry of an order of court ordering suspension of the abatement requirements. If the failure

1 to abate continues for more than 30 days, the department shall, within 30 days after the 30-day period, take  
2 appropriate action pursuant to 82-4-251(3) or request action under subsection (4) or (6) of this section.

3 (2) The department may waive the ~~civil~~ penalty for a minor violation of this part, a rule adopted or an  
4 order issued ~~adopted~~ under this part, or a term or condition of a permit if the department determines that the  
5 violation is not of potential harm to public health, public safety, or the environment and does not impair the  
6 administration of this part. The department may not waive a penalty assessed under this section if the person  
7 or operator fails to abate the violation as directed under 82-4-251. The board shall adopt rules to implement and  
8 administer a procedure for waiver of a penalty under this subsection.

9 (3) (a) To assess an administrative penalty under this section, the ~~The~~ department shall ~~notify the~~  
10 ~~person or operator of the violation~~ issue a notice of violation and penalty order to the person or operator, unless  
11 the penalty is waived pursuant to subsection (2). The notice and order must specify the provision of this part,  
12 rule adopted or order issued under this part, or term or condition of a permit that is violated and must contain  
13 findings of fact, conclusions of law, and a statement of the proposed administrative penalty. The notice and order  
14 must be served personally or by certified mail. Service by mail is complete 3 business days after the date of  
15 mailing. The notice and order become final unless, within 30 days after the order is served, the person or  
16 operator to whom the order was issued requests a hearing before the board. By filing ~~submitting~~ to the board  
17 a written request within 20 ~~30~~ days of receipt ~~service~~ of the notice of violation, stating the reason for the request,  
18 the person or operator is entitled to a hearing before the board under 82-4-206 on the issues of whether the  
19 alleged violation has occurred and whether the penalty proposed to be assessed is proper. ~~The department shall~~  
20 ~~issue a statement of proposed penalty no more than 10 days after issuing the notice of violation. On receipt of~~  
21 ~~a request, the board shall schedule a hearing. After a hearing, the board shall make findings of fact, shall and~~  
22 ~~issue a written decision as to the occurrence of the violation and the amount of penalty warranted, if~~ If the board  
23 ~~finds that the violation occurred, the amount of and a penalty is warranted, and it shall order the payment of the~~  
24 ~~penalty. If the time for requesting a hearing expires without a hearing request, the department shall make the~~  
25 ~~findings of fact and issue the written decision and order. The person or operator shall remit the amount of the~~  
26 ~~penalty within 30 days of the order~~ expiration of the period for requesting a hearing.

27 (b) If the person or operator to whom a final order is issued under subsection (3)(a) wishes to obtain  
28 judicial review of the ~~assessment~~ order, the person or operator shall submit with the ~~any assessed~~ penalty a  
29 statement that the penalty is being paid under protest and the department shall hold the payment in escrow until  
30 judicial review is complete. Any person or operator who fails to request and submit testimony at the hearing

provided for in this subsection (3)(a) or who fails to pay the any assessed penalty under protest within 30 days of the order assessing the penalty forfeits the right to seek judicial review of the violation ~~or~~ and penalty determinations.

~~(c) These penalties~~ Penalties provided for in this section are recoverable in any action brought in the name of the state of Montana by the attorney general by the department. The action must be filed in the district court of the first judicial district, Lewis and Clark County, or the district having jurisdiction over the defendant.

(4) ~~The attorney general shall, upon request of the director of the department, sue for the recovery of the penalties provided for in this section and~~ department may bring an action for a restraining order or temporary or permanent injunction against an operator or other person who:

(a) violates, threatens to violate, or fails or refuses to comply with any order or decision issued under this part;

(b) interferes with, hinders, or delays the department in carrying out the provisions of this part;

(c) refuses to admit an authorized representative of the department to the permit area;

(d) refuses to permit inspection of the permit area by an authorized representative of the department;

(e) refuses to furnish any information or report requested by the department in furtherance of the provisions of this part; or

(f) refuses to permit access to and copying of records that the department determines to be necessary in carrying out the provisions of this part.

(5) Any relief granted by a court under subsection (4)(a) continues in effect until the completion or final termination of all proceedings for review of relief granted under this part unless, prior to the final determination, the district court granting the relief sets it aside or modifies it.

(6) A person who violates any of the provisions of this part or any determination or order ~~adopted~~ issued under this part or who willfully violates any permit condition issued under this part is guilty of a misdemeanor and shall be fined an amount not less than \$500 and not more than \$10,000 or be imprisoned for not more than 1 year, or both. Each day on which the violation occurs constitutes a separate offense.

(7) Any person who knowingly makes any false statement, representation, or certification or knowingly fails to make any statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this part shall upon conviction be punished by a fine of not more than \$10,000 or by imprisonment for not more than 1 year, or both.

(8) Any person who except as permitted by law willfully resists, prevents, impedes, or interferes with

the department or its agents in the performance of duties pursuant to this part shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than 1 year, or both.

(9) An employee of the department performing any function or duty under this part may not have a direct or indirect financial interest in any strip- or underground-coal-mining operation. A person who knowingly violates the provisions of this subsection shall upon conviction be punished by a fine of not more than \$2,500 or by imprisonment of not more than 1 year, or both.

(10) Within 30 days after receipt of full payment of an administrative penalty assessed under this section, the department shall issue a written release of civil liability for the violations for which the penalty was assessed."

**Section 2.** Section 82-4-361, MCA, is amended to read:

**"82-4-361. Violation -- penalties -- waiver.** (1) When the department has reason to believe that a person is in violation of this part, a rule adopted or an order issued under this part, or a term or condition of a permit issued under this part, it shall send a violation letter to the person. The violation letter must describe the provision of the statute, rule, order, or permit alleged to be violated and the facts alleged to constitute the violation. The letter must also recommend corrective actions that are necessary to return to compliance. Issuance of a violation letter under this subsection does not limit the authority of the department under this part to bring a judicial action for penalties or injunctive relief or to initiate an administrative enforcement action.

(1)(2) (a) By issuance of an order pursuant to subsection (6), the ~~The~~ department may assess an administrative ~~civil~~ penalty of not less than \$100 or more than \$1,000 for each of the following violations and an additional administrative ~~civil~~ penalty of not less than \$100 or more than \$1,000 for each day during which the violation continues and may bring an action for an injunction from continuing the violation against:

(i) a person or operator who violates a provision of this part, a rule adopted or an order adopted issued under this part, or a term or condition of a permit; or

(ii) any director, officer, or agent of a corporation who willfully authorizes, orders, or carries out a violation of a provision of this part, a rule adopted or an order adopted issued under this part, or a term or condition of a permit.

(b) If the violation created an imminent danger to the health or safety of the public or caused significant environmental harm, the maximum administrative penalty is \$5,000 for each day of violation.

(c) This subsection does not limit the authority of the department to bring a judicial action for penalties or injunctive relief prior to or instead of initiating an administrative enforcement action under this part.

1       (3) The department may bring a judicial action seeking a penalty of not more than \$5,000 for a violation  
2 listed in subsection (2)(a) and a penalty of not more than \$5,000 for each day that the violation continues. In  
3 determining the amount of the penalty, the district court shall consider the factors in subsection (4).

4       ~~(2)(4)~~ The department shall take into account the following factors in determining whether to institute  
5 a civil penalty action and ~~the district court shall consider the factors~~ in determining the penalty amount:

6       (a) the nature, circumstances, extent, and gravity of the violation;

7       (b) the violator's prior history of violations;

8       (c) the economic benefit or savings, if any, to the violator resulting from the violator's action;

9       (d) the amounts voluntarily expended by the violator to address or mitigate the violation or impacts of  
10 the violation; and

11       (e) other matters that justice may require.

12       ~~(3)(5)~~ The department may bring an action for a restraining order or a temporary or permanent  
13 injunction against an operator or other person violating or threatening to violate an order issued under this part.

14       ~~(4) The department shall notify the person or operator of the violation. The department shall issue a~~  
15 ~~statement of proposed penalty within 30 days after issuing the notice of the violation. The person or operator,~~  
16 ~~by filing a written request stating the reason for the request within 20 days of receipt of the notice of proposed~~  
17 ~~penalty, is entitled to a hearing before the board on the issues of whether the alleged violation has occurred and~~  
18 ~~whether the penalty proposed to be assessed is proper. After the hearing, the board shall make findings of fact~~  
19 ~~and issue a written decision as to the occurrence of the violation and, if the board finds that the violation~~  
20 ~~occurred, the amount of penalty warranted. The board shall order the payment of a penalty in that amount. If the~~  
21 ~~time for requesting a hearing expires without a hearing request, the department shall make the findings of fact~~  
22 ~~and issue the written decision and order. The person or operator shall remit the amount of the penalty or petition~~  
23 ~~for judicial review within 30 days of receipt of the order. A person or operator who fails to request the hearing~~  
24 ~~provided for in this subsection or who fails to petition for judicial review within 30 days of receipt of the order~~  
25 ~~forfeits that person's or operator's right to seek judicial review of the violation or penalty determinations. These~~  
26 ~~penalties are recoverable in an action brought by the department in district court.~~

27       (6) (a) In addition to the violation letter sent pursuant to subsection (1), the department may also issue  
28 an order if it has credible information that a violation listed in subsection (2) has occurred. The order must specify  
29 the provision of the part, rule, order, or permit alleged to be violated and the facts alleged to constitute the  
30 violation. The order may require necessary corrective action within a reasonable period of time, may assess an

administrative penalty determined in accordance with this section, or both. The order must be served personally or by certified mail.

(b) An order issued pursuant to subsection (6)(a) becomes final unless, within 30 days after the order is served, the person to whom the order is issued submits to the board a written request for a hearing stating the reason for the request. Service of the order by mail is complete 3 business days after mailing. If a request for a hearing is submitted, a hearing must be held within a reasonable time under the contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6. After a hearing, the board shall affirm, modify, or rescind the order.

~~(5)(7)~~ Legal actions for penalties or injunctive relief under this section must be brought in the district court of the county in which the alleged violation occurred or, if mutually agreed to by the parties to the action, in ~~any other judicial district. Legal actions for review of penalty orders or for recovery of penalties must be brought in the district court in~~ the first judicial district, Lewis and Clark County."

**Section 3.** Section 82-4-441, MCA, is amended to read:

**"82-4-441. Penalty Administrative and judicial penalties -- enforcement.** (1) When the department has reason to believe that a person is in violation of this part, a rule adopted or an order issued under this part, or a term or condition of a permit issued under this part, it shall send a violation letter to the person. The violation letter must describe the provision of the statute, rule, order, or permit alleged to be violated and the facts alleged to constitute the violation. The letter must also recommend corrective actions that are necessary to return to compliance. Issuance of a violation letter under this subsection does not limit the authority of the department under this part to bring a judicial action for penalties or injunctive relief or to initiate an administrative enforcement action.

~~(4)(2)~~ By issuance of an order pursuant to subsection (5), the ~~The~~ department may assess against a person who violates any of the provisions of this part, rules adopted or orders issued under this part, or provisions of a reclamation permit:

(a) ~~a civil~~ an administrative penalty of not less than \$100 or more than \$1,000 for the violation; and

(b) an additional ~~civil~~ administrative penalty of not less than \$100 or more than \$1,000 for each day during which a violation continues ~~following the service of notice of the violation.~~

(3) The department may bring a judicial action seeking a penalty of not more than \$5,000 against a person who violates any of the provisions of this part, rules adopted or orders issued under this part or provisions

1 of a permit, and a penalty of not more than \$5,000 for each day that the violation continues. In determining the  
2 amount of the penalty, the district court shall consider the factors in subsection (4).

3 ~~(2)(4)~~ The department shall take into account the following factors in determining whether to institute  
4 a civil penalty action and ~~the district court shall consider the factors~~ in determining the penalty amount:

5 (a) the nature, circumstances, extent, and gravity of the violation;

6 (b) the violator's prior history of violations within the past 3 years;

7 (c) the economic benefit or savings, if any, to the violator resulting from the violator's action;

8 (d) the amounts voluntarily expended by the violator to address or mitigate the violation or impacts of  
9 the violation; and

10 (e) other matters that justice may require to decrease the amount of penalty.

11 ~~(3) The department shall notify the person or operator of the violation. The department shall issue a~~  
12 ~~statement of proposed penalty, including the penalty calculation that identifies and describes the factors~~  
13 ~~considered pursuant to subsection (2), no more than 10 days after issuing the notice of violation. After a hearing~~  
14 ~~provided for in 82-4-427, the board shall make findings of fact, issue a written decision as to the occurrence of~~  
15 ~~the violation and, if the board finds that the violation occurred, the amount of penalty warranted, and order the~~  
16 ~~payment of a penalty in that amount. If the time for requesting a hearing expires without a hearing request, the~~  
17 ~~department shall make the findings of fact and issue the written decision and order. The person or operator shall~~  
18 ~~remit the amount of any penalty within 30 days of the order. If the person or operator wishes to obtain judicial~~  
19 ~~review of the assessment, the person or operator shall submit with the penalty a statement that the penalty is~~  
20 ~~being paid under protest and the department shall hold the payment in escrow until judicial review is complete.~~  
21 ~~A person or operator who fails to request and submit testimony at the hearing provided for in this subsection or~~  
22 ~~who fails to pay the assessed penalty under protest within 30 days of the order assessing the penalty forfeits~~  
23 ~~the right to seek judicial review of the violation or penalty determinations. These penalties are recoverable in an~~  
24 ~~action brought by the department in the district court of the first judicial district, Lewis and Clark County, or in the~~  
25 ~~district court of the county in which the open-cut mine is located.~~

26 (5) (a) In addition to the violation letter sent pursuant to subsection (1), the department may also issue  
27 an order if it has credible information that a violation listed in subsection (2) has occurred. The order must specify  
28 the provision of the part, rule, order, or permit alleged to be violated and the facts alleged to constitute the  
29 violation. The order may require necessary corrective action within a reasonable period of time, may assess an  
30 administrative penalty determined in accordance with this section, or both. The order must be served personally

1 or by certified mail.

2 (b) An order issued pursuant to subsection (5)(a) becomes final unless, within 30 days after the order  
3 is served, the person to whom the order is issued submits to the board a written request for a hearing stating  
4 the reason for the request. Service of an order by mail is complete 3 business days after mailing. If a request  
5 for a hearing is filed, a hearing must be held within a reasonable time under the contested case provisions of  
6 the Montana Administrative Procedure Act, Title 2, chapter 4, part 6. After a hearing, the board shall affirm,  
7 modify, or rescind the order.

8 ~~(4)~~(6) The department may bring an action to enjoin an operator or other person violating or threatening  
9 to violate this part, rules adopted pursuant to this part, or a permit issued pursuant to this part. Actions for  
10 injunctions or penalties must be filed in the district court of the first judicial district, Lewis and Clark County, or  
11 in the district court of the county in which the opencut mine is located or, if mutually agreed on by both parties  
12 in the action, in the first judicial district, Lewis and Clark County.

13 (7) The provisions of this section do not limit the authority of the department to bring a judicial action  
14 for penalties or injunctive relief prior to or instead of initiating an administrative enforcement action under this  
15 part."

16  
17 COORDINATION SECTION. SECTION 4. COORDINATION INSTRUCTION. IF BOTH HOUSE BILL NO. 429 AND  
18 [THIS ACT] ARE PASSED AND APPROVED, THEN THE AMENDMENTS TO 82-4-441 IN BOTH HOUSE BILL NO. 429 AND [THIS  
19 ACT] ARE VOID AND 82-4-441 MUST READ AS FOLLOWS:

20 "82-4-441. **Penalty Administrative and judicial penalties -- enforcement.** (1) When the department  
21 has reason to believe that a person is in violation of this part, a rule adopted or an order issued under this part,  
22 or a term or condition of a permit issued under this part, it shall send a violation letter to the person. The violation  
23 letter must describe the provision of the statute, rule, order, or permit alleged to be violated and the facts alleged  
24 to constitute the violation. The letter must also recommend corrective actions that are necessary to return to  
25 compliance. Issuance of a violation letter under this subsection does not limit the authority of the department  
26 under this part to bring a judicial action for penalties or injunctive relief or to initiate an administrative  
27 enforcement action.

28 ~~(4)~~(2) By issuance of an order pursuant to subsection (5), the ~~The~~ department may assess against a  
29 person who violates any of the provisions of this part, rules adopted or orders issued under this part, or  
30 provisions of a reclamation permit:



1           (a) ~~a civil~~ an administrative penalty of not less than \$100 or more than \$1,000 for the violation; and

2           (b) an additional ~~civil~~ administrative penalty of not less than \$100 or more than \$1,000 for each day  
3 during which a violation continues following the service of notice of the violation.

4           (3) The department may bring a judicial action seeking a penalty of not more than \$5,000 against a  
5 person who violates any of the provisions of this part, rules adopted or orders issued under this part, or  
6 provisions of a permit, and a penalty of not more than \$5,000 for each day that the violation continues. In  
7 determining the amount of the penalty, the district court shall consider the factors in subsection (4).

8           (4) Penalties assessed under this section must be determined in accordance with the penalty factors  
9 in [section 3 of House Bill No. 429].

10          (2) ~~The department shall take into account the following factors in determining whether to institute a civil~~  
11 ~~penalty action and in determining the penalty amount:~~

12          ~~—— (a) the nature, circumstances, extent, and gravity of the violation;~~

13          ~~—— (b) the violator's prior history of violations within the past 3 years;~~

14          ~~—— (c) the economic benefit or savings, if any, to the violator resulting from the violator's action;~~

15          ~~—— (d) the amounts voluntarily expended by the violator to address or mitigate the violation or impacts of~~  
16 ~~the violation; and~~

17          ~~—— (e) other matters that justice may require to decrease the amount of penalty.~~

18          (3) ~~The department shall notify the person or operator of the violation. The department shall issue a~~  
19 ~~statement of proposed penalty, including the penalty calculation that identifies and describes the factors~~  
20 ~~considered pursuant to subsection (2), no more than 10 days after issuing the notice of violation. After a hearing~~  
21 ~~provided for in 82-4-427, the board shall make findings of fact, issue a written decision as to the occurrence of~~  
22 ~~the violation and, if the board finds that the violation occurred, the amount of penalty warranted, and order the~~  
23 ~~payment of a penalty in that amount. If the time for requesting a hearing expires without a hearing request, the~~  
24 ~~department shall make the findings of fact and issue the written decision and order. The person or operator shall~~  
25 ~~remit the amount of any penalty within 30 days of the order. If the person or operator wishes to obtain judicial~~  
26 ~~review of the assessment, the person or operator shall submit with the penalty a statement that the penalty is~~  
27 ~~being paid under protest and the department shall hold the payment in escrow until judicial review is complete.~~  
28 ~~A person or operator who fails to request and submit testimony at the hearing provided for in this subsection or~~  
29 ~~who fails to pay the assessed penalty under protest within 30 days of the order assessing the penalty forfeits~~  
30 ~~the right to seek judicial review of the violation or penalty determinations. These penalties are recoverable in an~~

1 ~~action brought by the department in the district court of the first judicial district, Lewis and Clark County, or in the~~  
2 ~~district court of the county in which the opencut mine is located.~~

3 (5) (a) In addition to the violation letter sent pursuant to subsection (1), the department may also issue  
4 an order if it has credible information that a violation listed in subsection (2) has occurred. The order must specify  
5 the provision of the part, rule, order, or permit alleged to be violated and the facts alleged to constitute the  
6 violation. The order may require necessary corrective action within a reasonable period of time, may assess an  
7 administrative penalty determined in accordance with this section, or both. The order must be served personally  
8 or by certified mail.

9 (b) An order issued pursuant to subsection (5)(a) becomes final unless, within 30 days after the order  
10 is served, the person to whom the order is issued submits to the board a written request for a hearing stating  
11 the reason for the request. Service of an order by mail is complete 3 business days after mailing. If a request  
12 for a hearing is filed, a hearing must be held within a reasonable time under the contested case provisions of  
13 the Montana Administrative Procedure Act, Title 2, chapter 4, part 6. After a hearing, the board shall affirm,  
14 modify, or rescind the order.

15 ~~(4)(6)~~ The department may bring an action to enjoin an operator or other person violating or threatening  
16 to violate this part, rules adopted pursuant to this part, or a permit issued pursuant to this part. Actions for  
17 injunctions or penalties must be filed in the district court of the first judicial district, Lewis and Clark County, or  
18 in the district court of the county in which the opencut mine is located or, if mutually agreed on by both parties  
19 in the action, in the first judicial district, Lewis and Clark County.

20 (7) The provisions of this section do not limit the authority of the department to bring a judicial action  
21 for penalties or injunctive relief prior to or instead of initiating an administrative enforcement action under this  
22 part."

23  
24 **NEW SECTION. Section 5. Saving clause.** [This act] does not affect rights and duties that matured,  
25 penalties that were incurred, or proceedings that were begun before [the effective date of this act].

26  
27 **NEW SECTION. Section 6. Contingent voidness.** (1) If any portion of [section 1] is disapproved by  
28 the United States secretary of the interior pursuant to 30 CFR 732.17, then [section 1] is void.

29 (2) Within 15 days of the effective date of the disapproval under subsection (1), the department of  
30 environmental quality shall notify the code commissioner, certifying that the disapproval under subsection (1)

1 has occurred.

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- END -